Supreme Court, U.S.
FILED
MAR 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1,305

IN THE

Supreme Court of the United States

October Term, 1989

CHARLES BEN HOWELL, ET AL.,

Petitioners,

v

THE SUPREME COURT OF TEXAS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

MELVYN CARSON BRUDER
Counsel of Record
for Petitioners
Three Forest Plaza
12221 Merit Drive
Suite 150
Dallas, Texas 75251
(214) 991-6474

TREVATHAN PRESS • LITTLE ROCK

TABLE OF CONTENTS

Request for Alternative Relief 1
Argument 2
Proceedings Below Relating to Question One . . . 2
Proceedings Below Relating to Question Two . . . 3
Proceedings Below Relating to Question Three . . . 4
Petitioner's Case Was Not Fairly and Fully Decided by the Fifth Circuit 4
The Slate Must Be Wiped Clean 9
The Void Judgment Ruling of the Court Below Conflicts with a Recent Decision of the Third Circuit 10

AUTHORITIES

Statutes and Rules

FRCVP 52(a) 6
FRCRP 23(c) 6

Cases

Atlantic Coast v Engrs., 398 US 281 (70) 3, 4
CA v Krivda, 409 US 1068 (72) 8
Cooter v Hartmarx, cert.grtd., – US –, 58 LW 3258 (no. 89-275,17OC89) 1, 4
Danik v Hartmarx, 875 F2d 890 (CADC 88) 4
Dist Col Ct. v Feldman, 460 US 462 (83) 3,4,fn2
FL v Rodriguez, 469 US 1 (84) (dsnt) 5
Goldberg v Kelly, 397 US 254 (70) 7
Re: Highway Truck Drivers, 888 F2d 293,9n. (3-PA 89) . . . 11
Mesquite v Aladdin, 455 US 283 (82) 8
Morrissey v Brewer, 408 US 471 (70) 7
Murchison, In re, 349 US 133 (55) 9
Northcross v Board, 412 US 427 (73) 7
Offutt v US, 348 US 11 (54) 10
Pennzoil v Texaco, 481 US 1 (87) 1,2,fn2
Rochin v CA, 342 US 165 (52) fn4

Rooker v Fidelity, 263 US 413 (23) 3, 4, 10
State Bar v Howell, 460 US 1065 (83) 5
Taylor v Hayes, 418 US 188 (74) 9
Texaco v Pennzoil, 784 F2d 1133 (2-NY 86) 2
Thermtron v Hermansdorfer, 423 US 336 (76) 6
US v Forness, 125 F2d 928 (2-NY 42) 7
US v Huff, 512 F2d 66 (5-GA 75) 9

Texts and Other

Bork, *Dealing with the Overload*, 70 FRD 131 (76) . . . fn3
Helman, *Granted, Vacated and Remanded*, 67 Judicature 389 (84) 10
Llewellyn, *Common Law Tradition*, 290 (60) 6
Stern, G. & S., *S.Ct.Prac.*, §4.15 5
Stern, G. & S., *S.Ct.Prac.*, §5.12(b) (6 ed.86) 5
US Sen. Rpt., 94-404 p.25 (75) fn3

Petitioners, Charles Ben Howell et al. hereby request leave to present this supplement to their petition for certiorari pointing out recent proceedings in the United States Supreme Court and the United States Court of Appeals pertaining to issues in petitioner's case and seeking alternative relief on the basis of further research petitioner was unable to include in his original petition.

REQUEST FOR ALTERNATIVE RELIEF

Should the Court decide not to grant a writ for the purpose of fully deciding the case on its merits, then in such instance, petitioners request that the writ be summarily granted and that the judgment of the Court below, the United States Court of Appeals for the Fifth Circuit, be vacated and the case remanded to that court with instructions:

(1) That the Court of Appeals reconsider its Issue One (Question One here) in light of *Pennzoil v. Texaco*, 481 US 1 (86), and;

(2) That the Court of Appeals also reconsider its Issue Three (Question Two here) in light of the fact that petitioners have challenged the action of the Texas justices as void, that none of the authorities relied upon by the Court of Appeals purports to lay down a rule respecting void judgments, and that another court of appeals has recently made a contrary ruling, and;

(3) That, in addition, the Court of Appeals reconsider Issues Four and Five before it (Question Three here) in light of this Court's decision to be rendered in the case of *Cooter v. Hartmarx, cert.grtd*, — US —, 58 LW 3258 (no. 89-275, 17OC89). Pending a decision in *Cooter*, the Supreme Court should withhold its final ruling.

(4) Petitioner further requests that, in the interest of fairness, the Court below be instructed to provide to these petitioners a complete de novo hearing before another panel of the Court of Appeals.

ARGUMENT

Proceedings Below Relating to Question One: *Pennzoil v. Texaco*, 481 US 1 (87) is the latest decision of the Supreme Court regarding jurisdictional preclusion. For reasons that cannot be fathomed, the Court below has cited and quoted opinions of the Supreme Court dated from 1923 to 1983, but it has bypassed the Supreme Court's most recent decision in complete silence (see PA 7-12).

The omission to address the effect of *Texaco* was certainly not attributable to petitioner. At the outset, in his "Summary of Argument," petitioner cited the *Texaco* opinions of this Court and the Second Circuit, *Texaco v. Pennzoil*, 784 F2d 1133 (2-NY 86) four different times (ant.br.6-7). During his 21-page argument to the Court of Appeals in support of his Issue One, petitioner cited, discussed and quoted from the *Texaco* litigation 28 times. (ant.br.19-24, 7-9, 31, 3)[1]

Petitioner's reply brief to the Fifth Circuit was devoted to refuting a myriad of contentions by respondents.

---

[1] In the argument under his Issue One, petitioner included the following subtitles:

> Texaco in the Second Circuit—The Feldman Window Applied to the Texas Rules of Procedure (ant.br. 19-20).
>
> Texaco in the Supreme Court—The Feldman Window Confirmed (ant.br. 20-1).
>
> [The Second Circuit Opinion in] Texaco . . . Did Not Expressly Hold that Raising a Federal Claim in State Court Was a Jurisdictional Preclusion (ant.br. 21-3)
>
> The Supreme Court, in Texaco . . . Indicated That Raising the Federal Claim in State Court Does Not Create a Jurisdictional Preclusion (ant.br. 23-4).

Nevertheless, petitioner cited and discussed the *Texaco* litigation sixteen times (ant.rep.2, 5, 7-9, 10-13, 29). Thereafter the *Texaco* litigation was cited or discussed seven times in the course of a nine-page petition for rehearing (ptn.reh. 2, 4-5, 8).[2] However, in spite of this petitioner's obvious insistence upon the importance of the *Texaco* litigation to the within case, the Fifth Circuit chose not to address *Texaco* in its decision (PA 1-13).

Proceedings Below Relating to Question Two: The argument and authority under Issue Three (ant.br. 1, 8, 37-43) are much the same as Question Two (ptn.cert. 23-7) herein. The Fifth Circuit cursorily brushed off Issue Three with the bald declaration that petitioner was seeking "the type of review the Supreme Court rejected in *Rooker, Atlantic Coast* and *Feldman*" (PA 11-2).

Petitioner's Reply Brief to the Fifth Circuit contained a topic arguing that *Rooker v. Fidelity*, 263 US 413 (23) and its progeny contained "not the slightest intimation that the state court judgment under attack was without jurisdiction or void" (ant.rep. 3-4).

Petitioner's third point on rehearing read:

> This Court seriously misconstrued . . . *[Rooker, Atlantic* and *Feldman]* in holding

---

[2]The petition for rehearing in the Court of Appeals contained three points, point 1 reading:

> This Court failed to apply the principles set out in Pennzoil Company v. Texaco, Inc., 107 S. Ct. 1519 (1987), which allow the application of District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), in situations where the validity of a state rule is challenged first in state courts and then in federal court.

(ptn.reh. 2).

> that those cases forbid a collateral attack in federal district court upon a void state judgment.

(ptn.reh. 2-3) The argument thereunder quoted from *Rooker* wherein such authority carefully pointed out that it was addressing a case where the jurisdiction of the state court was plenary and no void-judgment claim had been suggested. Petitioner also urged that neither *Atlantic* nor *Feldman* possessed any void-judgment aspects (pet.reh. 6-8). Nevertheless, the Court persisted in its ruling.

Proceedings Below Relating to Question Three: Issues Four and Five (ant.br. 1, 9, 43-9) were substantially similar to Question Three before the Supreme Court. The Fifth Circuit limited itself to the comment that it could find no abuse of discretion on the part of the trial court (PA 13).

Petitioner's Case Was Not Fairly and Fully Decided by the Fifth Circuit: One of the questions accepted for review in *Cooter* was "(3) Is review of Rule 11 sanctions under 'abuse of discretion' standard appropriate?" 58 LW 3220-1 (pub. date 03OC89, condensation). We are advised that *Cooter* was argued February 20 and awaits decision. If Cooter's third question is sustained in any measure, it is plain that the Fifth Circuit seriously erred in the manner in which it reviewed the sanctions order in petitioner's case.

However, the Fifth Circuit took a much more sweeping view of abuse of discretion than the Court of Appeals did in *Cooter. Danik v. Hartmarx*, 875 F2d 890, 96-7 (CADC 88). There, the abuse of discretion challenge was only aimed at the alleged excessiveness of the sanctions imposed. Presently, your petitioner filed no attack upon the award as to amount. Instead, he has contended that in the absence of

disputed facts, the question whether this petitioner presented a sufficiently meritorious legal argument to insulate him from the imposition of sanctions is a question of law which must be independently reviewed by the appellate court.

Clearly, the Fifth Circuit has not applied the proper test. If the Supreme Court declines to grant a plenary hearing on the merits of Question Three, it should grant, vacate and remand, at least with respect to that question. The use of the grant, vacate and remand (GVR) device is well established in Supreme Court practice with respect to intervening decisions. *e.g.*, *State Bar v Howell*, 460 US 1065 (83); Stern, G. & S., *S.Ct.Prac.* §5.12(b)(6 ed.86). At a minimum the perfunctory review of the sanctions must be set aside and the Court ordered to fully consider the sanctions issue.

With regard to Questions One and Two, it is also evident that the Fifth Circuit has not issued a decision that begins to meet the arguments presented by this petitioner, the appellant below. We submit that the GVR device is singularly appropriate as a means to exercise supervisory jurisdiction over the Court of Appeals.

> As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation.

FL v Rodriguez, 469 US 1, 7 (84) (dsnt.). Stern, G. & S., §4.15. There are numerous cases illustrating the housekeeping powers and obligations of the Supreme Court. For example, even though orders denying removal from state court are expressly non-appealable, a district court will still be

forbidden to deny removal simply because its docket is overburdened. The Supreme Court, in the exercise of its supervisory powers will require the court below to exhibit a reason, recognized by law for remanding a case to state court. *Thermtron v. Hermansdorfer*, 423 US 336 (76).

A few years back, the federal appellate courts—the Fifth Circuit being in the lead—launched an experiment in omitting opinion writing, declaring such to be necessary in order to cope with the caseload. The practice brought a firestorm of protest[3] and has been greatly curtailed. The practice of writing superficial opinions is equally unsatisfactory and even more insidious.

It has been stated that one of the major functions of opinion writing, "and no slight one" is to assure to the parties that the case has been dealt with carefully and fully. Llewellyn, *Common Law Tradition*, 290 (60). We suggest that the opinion under discussion falls substantially short of that goal. The requirement that a decision maker explain his decision is widespread. A trial court sitting as a finder of fact must do so. FRCVP 52(a); FRCRP 23(c). Due process requires that an administrative decision maker "state the reasons for his determination and indicate the evidence he

---

[3]Professor Bork charged that the Fifth Circuit had resorted to "[a] certiorari-type discretionary review . . . totally contrary to the traditional and statutory appeal as a matter of right." Bork, Dealing with the Overload, 70 FRD 131,3 (76). He stated:

> These trends . . . may erode the integrity of the law and the decisional process. The intuitive wisdom of Anglo-American law has insisted upon oral argument and written opinions for very good reason. Judges, who are properly not subject to any other discipline, are made to confront the arguments and to be seen doing so. They are required to explain their result and thus to demonstrate that it is supported by law and not by whim or personal sympathy.

Id. A Senate judiciary report stated:

> Our concept of due process imposes limits on the nature and on the extent of permissible shortcuts in the appellate process. . . .

US Sen.Rpt. 94-404, p.25 (75)

relied on." *Goldberg v Kelly*, 397 US 254, 71 (70). *Accord: Morrissey v. Brewer*, 408 US 471, 88-9 (70) (Due process requires "written statement . . . as to the evidence relied on and the reasons for revoking parole.") The judiciary should live up to the same standards that are imposed upon administrative tribunals. *US v Fomess*, 125 F2d 928 (2-NY 42) (Jerome Frank, J.)

Quoting from Edmund Burke, Mr. Justice Frankfurter intimated that appellate decision writing is a due process fundamental.[4] We further present that he has struck upon the proper test for a minimally acceptable opinion; it must be *"a reasoned opinion."* It must demonstrate that the court has based its decision upon the law and the evidence rather than "whim or personal sympathy." Bork, *supra*. Applied to the case at hand, an opinion that fails to address the Supreme Court's latest decision in point—particularly when the appellant stridently and repeatedly urges that it is controlling, an opinion that relies on an authority that disclaims any intent to address the void judgment rule, an opinion that upholds sanctions for filing a supposedly frivolous action while failing to reach the plaintiff's jurisdictional arguments, is not the type of *"reasoned opinion"* that due process demands of a federal appellate tribunal.

There is direct precedent for the relief requested herein. In *Northcross v Board*, 412 US 427 (73), the Fifth Circuit denied a motion for award of attorney's fees without stating a reason for the denial. The Supreme Court vacated

---

4 "Your committee do not find any positive law which binds the judges of the courts in Westminster-hall publicly to give a reasoned opinion from the bench, . . . But the course hath prevailed from the oldest times. It hath been so general and so uniform, that it must be considered as the law of the land."
Rochin v. CA., 342 US 165, 70-1 (52).

and remanded "for further proceedings," presumably an opinion setting forth the lower court's reasoning. See also *CA v Krivda*, 409 US 1068 (72) (judgment vacated so that state court might supplement its opinion to indicate if its disposition was based on state or federal constitution); *simile: Mesquite v Aladdin*, 455 US 283 (82). This Court is no less hampered by the inadequate opinion in the case in hand than by the lack of one in *Northcross*.

Also, as the nation's legal system grows and expands, there remains but one Supreme Court. Strive as it might, the Court cannot grant plenary review to the same proportion of its docket as it did fifty, ten, or even five years ago. An ever larger percentage of litigants must accept the wisdom of the Courts of Appeal as their final recourse.

As a corollary, it follows that the housekeeping obligations of the Supreme Court are increasing. The Court has a greater obligation to see to it that hearings before the Courts of Appeal are full and fair. Likewise, the need for GVR is increasing. Even one order from the Supreme court requiring that a Court of Appeals further consider its decision will have a salutary and widespread effect upon the standards of appellate decision-making.

The Slate Must Be Wiped Clean: Inasmuch as the return of the case to the Court below for the replacement of an unsatisfactory opinion implies a criticism for its authors, the Supreme Court must require that the case be heard anew before an entirely different panel. Nothing less than *de novo* will suffice. No aspersions upon any member of the original submission panel is intended; they simply should not be exposed to the human temptation to convert the opinion writing function into an exercise in self-justification.

It is established that a judge who is the originator of a contempt complaint is barred from conducting a trial of those charges. *In re Murchison*, 349 US 133 (55); *Taylor v. Hayes*, 418 US 188 (74). The temptation to engage in self-justification is too great. Similarly, it is a common practice whenever a criminal conviction is reversed for sentencing error to require that the defendant be re-sentenced before another judge. *US v Huff*, 512 F2d 66 (5-GA 75).

Professor Hellman's research discloses that a very high proportion of GVR orders results in decisions that adhere to the original ruling. Hellman, *Granted, Vacated and Remanded*, 67 Judicature 389, 94-5 (84). It is our hypothesis that the Supreme Court rarely issues GVR orders unless it is concerned that the initial disposition may have been erroneous. The high proportion of unchanged dispositions raises questions whether a judicial tendency toward self-justification does, in fact, exist.

The requested GVR order will directly imply a criticism of the manner in which the case was handled by the Court below. The Supreme Court needs an analytical and completely objective opinion, not an opinion which must be inspected for indications of self-justification. The only means to assure that such will be received is to require *de novo* consideration before another panel. We again disclaim any intent to cast aspersions. However, a new panel is a necessity in order that justice not only be done but that justice appear to have been done. *Offutt v US*, 348 US 11,4 (54).

The Void Judgment Ruling of the Court Below Conflicts With a Recent Decision of the Third Circuit: Lacking significant authority or discussion, the Fifth Circuit has applied Rooker-Feldman to void judgment claims (PA 11-2). Approximately three weeks after the decision below, the

Third Circuit independently reached the exact opposite conclusion. *Re: Highway Truck Drivers*, 888 F2d 293, 9 n (3-PA 89).

We grant that neither did *Highway* probe the matter in depth. However, it has expressed the better view. In any instance, *there is now a direct conflict between the circuits.* The Supreme Court should issue a plenary grant of certiorari or apply GVR to resolve the conflict.

Conclusion: The writ should issue. Alternatively, petitioners should have the relief requested at the outset hereof.

Respectfully submitted,

MELVYN CARSON BRUDER
Counsel of Record
for Petitioners
Three Forest Plaza
12221 Merit Drive
Suite 150
Dallas, Texas 75251
(214) 991-6474